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Ethics and Malpractice

David Luban

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*David Luban**

In *Carlson v. Morton*,[1] Montana joined the numerous jurisdictions that refuse to find that violations of lawyers' ethical codes constitute sufficient grounds for establishing legal malpractice; instead, the Montana Supreme Court requires expert testimony to demonstrate that the standard of due care was not met.[2] A related issue surfaced in *Garcia v. Rodey, Dickason, Sloan, Akin & Robb*,[3] where the court found that breach of New Mexico's ethics rules does not give rise to a private cause of action for damages against attorneys.[4] *Garcia* combines this issue with another extremely interesting one, namely whether a lawyer owes actionable duties toward his adversaries. The court echoed the opinion that a party can never, or virtually never, sue an adversary attorney for negligence.[5]

Both issues—the use of ethical codes to establish malpractice, and the possibility of establishing negligence against an adversary attorney—are reasonably well settled. Most courts deny liability under either theory. Yet both doctrines deserve a close second look, for there are strong reasons in favor of liability, while the traditional reasons for opposing it are surprisingly flimsy. Or so I shall suggest.

I.

The ABA Model Code of Professional Responsibility denies that its provisions "define standards of civil liability,"[6] and the ABA Model Rules of Professional Conduct states in the scope section of its preamble that "[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached."[7] Both the *Carlson* and *Garcia* courts took these disclaimers as stopping points for their analyses, where in point of fact the disclaimers should scarcely be treated even as starting points. Why, after all, should an organization of professionals be able to conjure civil liability away at its own say-so? In the case of the Model Rules, whose passage by the ABA House of Delegates was accompanied by fierce public bickering,[8] it is especially clear that bar politics plays an enormous role in the formulation of ethical codes; one might well imagine that without some disclaimer regarding civil liability, the Model Rules, and proba-

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* Professor of Law, University of Maryland; Research Scholar, Institute for Philosophy and Public Policy. This article is a revised version of a commentary that appeared in the *National Reporter on Legal Ethics and Professional Responsibility*.

1. 745 P.2d 1133 (Mont. 1987).
2. *Id.* at 1136-38.
3. 750 P.2d 118 (N.M. 1988).
4. *Id.* at 123-24.
5. *Id.* at 122.
6. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (preliminary statement) (1981).
7. MODEL RULES OF PROFESSIONAL CONDUCT (scope) (1991) [hereinafter MODEL RULES].
8. *See* Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQ. 677 (1989).

bly the Code, would never have been passed. No professional association can be expected to approve elaborate sets of rules enumerating grounds for suing its members. And, conversely, the bare fact that the ABA says that its members should not be sued when they violate the rules intended as enforceable standards should be regarded simply as wishful thinking, not authoritative pronouncement.[9]

Shortly I shall suggest some more convincing reasons why the codes should not be used to define civil liability; first, however, I sketch the affirmative case for employing the codes as malpractice standards.[10] Essentially there are two arguments, one practical and one theoretical.

A. The Practical Argument

The practical argument begins with the routine observation that the codes are drastically underenforced. A glance through any month's listings of attorney disciplinary matters, in any state, reveals a typical pattern. Virtually every case concerns lawyers stealing their clients' money, being convicted of other felonies, or grossly neglecting client affairs. Alcohol and drug abuse are implicated in the bulk of these cases. Thus, if one were to give realistic advice to aspiring lawyers about how to avoid attorney discipline, it would be this: "If you don't steal your clients' money, neglect their affairs, get convicted of a felony, engage in substance abuse, or get caught lying to a court, you have little to fear from the disciplinary system."

But what about all those carefully crafted rules in the Code and Model Rules? With one exception to be noted, they are close to dead letter. One simply does not find attorneys being disciplined for failing to report other lawyers' violations of the rules (DR 1-103(A), Model Rule 8.3(a)),[11] making public statements concerning the merits of criminal cases they are defending (DR 7-107(B), Model Rule 3.6), failing to reveal client fraud to an affected person (DR 7-102(B)(1) in jurisdictions that do not include the "except" clause), or billing a finder's fee (DR 2-107, Model Rule 1.5(e)). Yet few observers of the legal scene would deny that these are very common infractions.

The only rigorously enforced ethical rules (apart from those mentioned, which impose discipline on thieving, felonious, and neglectful lawyers) are the rules concerning conflicts of interest violations which are almost never addressed through the disciplinary process. Instead, these violations are litigated in the form of motions to disqualify conflict-ridden opposing counsel. In other words, the conflict

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9. Neither Montana nor New Mexico adopted these disclaimers with their codes of professional responsibility.

10. The most influential advocate of this affirmative view is Charles W. Wolfram, author of *Modern Legal Ethics* and reporter for the *Restatement of the Law Governing Lawyers*. *See* Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S. C. L. REV. 281 (1979) [hereinafter Wolfram]. Perhaps the best arguments in the negative are found in Robert Dahlquist, *The Code of Professional Responsibility and Civil Damage Actions Against Attorneys*, 9 OHIO N.U. L. REV. 1 (1982) [hereinafter Dahlquist].

11. The exception to this assertion is one that truly proves the rule. *In re Himmel*, 533 N.E.2d 790 (Ill. 1988), is the first and, to my knowledge, only reported decision imposing discipline for an attorney's failure to report collegial misconduct. The factual circumstance in this case were highly atypical. *See* Ronald Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of* Himmel, 1988 U. ILL. L. REV. 977.

of interest rules are enforced only because they may be pressed into service as litigation weapons. The lesson could not be more clear: ethical rules will lie fallow *unless an adversary attorney—not a layperson, but an attorney—can gain an advantage by invoking the rule in court—not before a grievance committee, but a court.* Underlining this general law is the fact that, although every successful disqualification motion implies that the conflicts rules have been violated, which could logically lead to disciplinary proceedings, the losing lawyers (typically large, prestigious law firms) are never disciplined.

As corrobation, consider as well the attempt to regulate excess zeal. Disciplinary Rule (DR) 7-102(A)(2) states that "a lawyer shall not knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law."[12] Model Rule 3.1 employs very similar language, except that the subjective element implied by the word "knowingly" does not appear.[13] Both rules are virtually dead letter in the grievance process. However, Federal Rule of Civil Procedure 11[14] is directed to the same end of preventing frivolous litigation, and is drafted in almost the same words as Model Rule 3.1[15] and DR 7-102(A)(2). After the rule was strengthened in 1983, motions for Rule 11 sanctions became an often-employed tactical tool. The same two points made about the conflict rules emerge clearly in the case of Rule 11. First, ethical rules against frivolous litigation will lie unenforced unless an adversary attorney—not a layperson—can gain advantage by invoking the rule in court. Second, and underlining the first, one looks in vain for collateral disciplinary proceedings growing out of the explosion of Rule 11 sanctions.

The logical conclusion is that the ethics codes will continue to warm the bench until lawyers are given causes of action based on the codes, as in the case of the conflict of interest rules and Rule 11. Hence, the practical attractiveness of the proposal to attach civil damages to ethical breaches.[16] Presumably, enforcing the codes would help deter attorneys from violating them, and, if our general law is right, the codes will not be enforced until adversary attorneys—not laypersons—are provided with handles and incentives for invoking them in court.

Of course, one might reply that the codes are not meant to be enforced. They are aspirations, ethical ideals, serving a primarily hortatory function, not hard law. This reply, however, is wrong in almost every way. The codes have always been treated as hard law when it suited the purposes of the bar (as in the meticulously detailed regulation of advertising, or the unauthorized practice provisions); and a glance at the content of the rules should suffice to disabuse us of the notion that they are merely aspirational. What is "aspirational" about rules requiring law-

12. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1981).
13. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1990).
14. FED. R. CIV. P. 11.
15. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1990).
16. *See* Wolfram, *supra* note 10, at 290-93.

yers not to write themselves into their clients' will (EC 5-5[17])? Moreover, the transition from the 1908 Canons to the Code to the Model Rules has at each stage toned down the rhetoric of morality and added emphasis to the notion that rules set a regulatory framework.[18]

In fact, the only way the objection makes sense is in its most cynical reading. For decades critics of the legal profession have charged that its ethical codes are never meant to be enforced, and that they are merely public relations documents, designed to mollify the world at large and to ensure that control of the profession remains in its own hands.

To this argument the reply is that even if that's the way the world is, it's not the way the world should be. Even if the ethics codes are hypocritical, it is still open to us to enforce them nonhypocritically. Hypocrisy, La Rochefoucauld wrote, is the homage vice pays to virtue. Why not instead just try to promote virtue?

B. The Theoretical Argument

The question whether violating a statutory standard in and of itself constitutes negligence is standard fare in the first year torts course, and casebooks typically point out that courts split on the issue in different contexts.[19] The theoretical argument for utilizing the ethics codes as malpractice standards derives from the fact that a judgment of attorney negligence and a judgment that an attorney has breached the ethics codes carry closely related meanings. Saying that an attorney has been negligent means that he or she has failed to carry out a professional duty as carefully as a reasonable professional should. Though this does not imply that the attorney has been unethical, the converse relationship must hold. An attorney who violates the ethics rules is subject to discipline that can include suspension or disbarment. Discipline is imposed "to protect the public and the administration of justice from lawyers who have demonstrated by their conduct that they are unable or likely to be unable to properly discharge their professional duties."[20] To engage in conduct that warrants discipline is thus, almost by definition, to engage in conduct that falls below a "reasonable professional" standard of care.[21] In short: while negligence need not imply a breach of ethics, a breach of ethics is bound to be negligence (provided of course that the other elements—damage and causation—are met).

Carlson perfectly illustrates the point. Its facts are egregious indeed: Morton, a bank officer moonlighting as a lawyer, represented and advised Carlson in matters embroiling Carlson in financial obligations to Morton's bank.[22] Eventually the

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17. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-5 (1981).

18. *See* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L. J. 1239 (1991) (detailing evolution of ethics codes from fraternal admonition to legal regulation).

19. *See* Nazareno v. Urie, 638 P.2d 671 (Alaska 1981); Martin v. Herzog, 126 N.E. 806 (Ct. App. N.Y. 1920).

20. ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS Standard 1.1 91979) [hereinafter ABA STANDARDS].

21. *See generally* WILLIAM L. PROSSER, THE LAW OF TORTS § 32, at 161 (4th ed. 1971) [hereinafter PROSSER].

22. *Carlson*, 745 P.2d at 1134.

bank sued Carlson, alleging in its suit that Carlson had taken certain illegal actions that Morton himself, in his role as Carlson's lawyer, had advised.[23] Indeed, the bank's affidavit included confidential information given by Carlson to Morton in the course of their attorney-client relation.[24] Carlson charged that Morton had neglected his affairs and lied to him and that Morton's undoubted violation of various Disciplinary Rules (DR 1-102(A)(4), DR 4-101(B), several Canon 5 rules, DR 6-101, and DR 7-102) constituted clear negligence, so clear that no expert testimony was required.[25] The Montana Supreme Court disagreed, enunciating a rule that in the future will compel malpractice plaintiffs to undertake the needless expense of hiring an expert to testify that flagrant attorney dishonesty, double-dealing, and conflict of interest is indeed "improper and negligent."[26]

This irrational result might be defended by arguing that even if the Disciplinary Rules were taken as a standard of civil liability, a legal ethics expert would still be required to prove that Morton's behavior violated them. On the facts of *Carlson* this would be a difficult argument to make, since the DRs in question are straightforward and Morton's behavior quite clearly violated them. Moreover, there seems to be no reason that the question of whether a set of facts violates legal standards should not be put directly to a jury. That's what juries are for.

As I have indicated, however, the argument took a different turn, with the court asserting that the Code cannot be taken as a civil liability standard to begin with. I suggest, to the contrary, that facts such as those in *Carlson* are precisely the kind in which it makes the most sense to use the Code as a measure of malpractice liability. Egregious multiple Code violations such as those described in *Carlson* show not only that the attorney is "unable or likely to be unable to discharge his professional duties"[27] (the condition that triggers discipline), but also, and for that reason, that the conduct falls below the "reasonable attorney" standard used to establish negligence.[28] According to Robert Dahlquist, the Code and the Rules "state the minimum acceptable level of attorney conduct while civil liability is based on the expected conduct of a reasonable and prudent lawyer."[29] Since the latter standard is higher, any violations of the codes is a fortiori negligent. However, since the converse is not true, attorneys should never be able to escape liability by arguing that their actions conformed to the codes; actions can be negligent while remaining above the minimum acceptable level of attorney conduct.

II.

The argument, then, is that breach of the ethics codes is a breach of duty constituting negligence. Several doubts arise in connection with this argument, how-

23. *Id.* at 1134-35.
24. *Id.* at 1135.
25. *Id.*
26. *Id.*
27. *See* ABA STANDARDS, *supra* note 20.
28. *See* PROSSER, *supra* note 21.
29. Dahlquist, *supra* note 10, at 23.

ever. The most significant is that the lawyer's duty to obey the ethics codes is not a duty to the client (or other malpractice plaintiff), but is owed instead to "the administration of justice,"[30] to the courts, and to the public generally. In one version of the objection, it simply begs the question to assume that the duties contained in the ethics codes run to individual malpractice plaintiffs. In another version, the lawyer's duty to obey the ethics codes is a public duty, since an attorney is an officer of the court. In that case it falls under the "public duty doctrine,"[31] which forecloses negligence actions against public officials who inadequately perform their duties. The public duty doctrine postulates, for example, that the duty of a police officer is to apprehend criminals. That duty is owed to the public generally, not to specific members of the public.[32] Thus, if a criminal mugs a citizen after the police have negligently failed to apprehend him, the citizen has no cause of action against he negligent police officer because the officer's duty does not run to the citizen, who is the victim of the criminal's violence. Similarly, in the case of the unethical lawyer, although the client is injured, the lawyer's duty runs to the public and not the client; thus, the client has no grounds of recovery.

However, the public duty doctrine is gradually eroding the courts,[33] and in any event, as Prosser observes, "[t]he statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct."[34] If it begs the question to assert, as this argument does, that the duties contained in the ethics codes run to the malpractice plaintiff, it begs the question equally to assert that they do not.

In fact, the problem is more a notional difficulty than a real one. It should not prove too difficult to avoid begging the question. Surely we can determine in a common-sense fashion which rules are intended to establish duties to individuals and which are not. As an example of a rule that does not establish a duty to anyone, consider DR 2-108(B),[35] which reads "[i]n connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law."[36] Equally clear, DR 2-107,[37] concerning fee splitting, is intended to protect clients, and should therefore be taken as a standard for civil liability.[38]

This kind of rule-by-rule inquiry is difficult only for rules that seem designed to protect the administration of justice, or the integrity of the courts, rather than any

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30. *See* MODEL RULES, *supra* note 7.

31. *See generally* PROSSER, *supra* note 21, at § 132.

32. South v. Maryland, 59 U.S. (18 How.) 396 (1856). *See also* Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821 (1981) [hereinafter *Police Liability*].

33. *See Police Liability, supra* note 32.

34. PROSSER, *supra* note 21, at 325. The author wishes to thank Professor Oscar Gray for the points raised here concerning the public duty exception.

35. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108(B) (1981).

36. *Id.*

37. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107 (1981).

38. *Id.*

person. Take for example Model Rule 3.3, "Candor Toward the Tribunal",[39] or DR 7-106, "Trial Conduct."[40] Violating them will often harm other people, particularly adversaries, but it seems that whatever duty they establish runs to the courts, and at best indirectly to the injured parties. Why, then, give these injured parties a cause of action based on the rules?

The issue that underlies such concerns is that malpractice actions were traditionally limited to parties in privity with the lawyer, and that meant the lawyer's clients. In *Savings Bank v. Ward*,[41] the Supreme Court invoked privity in legal malpractice to prevent the "floodgates of litigation" from opening.[42] In other areas of tort, of course, privity has disintegrated through the twentieth century. The erosion of privity in legal malpractice began with *Biakanja v. Irving*[43] and *Lucas v. Hamm*.[44] Currently the major exceptions to privity are malpractice actions brought by intended beneficiaries of negligently drafted wills and by parties who relied on badly executed title searches. Virtually all courts allow such actions to be brought. There is no reason why the privity rule should not erode still further.

It is virtually certain that this issue will arise repeatedly, and in highly sophisticated litigation, over the next few years. In the wake of widespread bank and thrift failures, typically resulting from speculative loans and unwise investments during the "Get Rich Quick Eighties," creditors (including the Resolution Trust Corporation) have begun to search for deep pockets to sue in order to recoup some of their losses. Conspicuously, these deep pockets include the famous and wealthy law firms whose opinion letters and participation in shaky mega-deals taped together the financial houses of cards that subsequently collapsed. Investors and other institutions that joined mega-deals in reliance on the opinion letters and integrity of the major Wall Street law firms have filed hundreds of suits against these firms – suits that will test the privity rule in the most strenuous way. As the magnitude of the law firms' greed and folly becomes clearer, we may expect the privity rule to erode.

Particularly in the situations considered here, where the party in privity with the lawyer is something as abstract as the administration of justice or the court, it would be mad to permit the privity rule to block liability to someone injured because a lawyer has violated an ethical rule. The court, after all, imposes duties on lawyers such as the requirement of candor, in order best to serve and protect the interests of litigants before it. A lawyer does not lie to the court for the fun of lying to the court, but in order to win the case and to beat the adversary and the court requires candor not simply to protect its own dignity, but more importantly to protect those people who will be wronged if the lying lawyer wins the case – most obviously, the adversary. It would be ridiculous, then, to deny the existence of a duty

39. MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 3.3 (1990).
40. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106 (1981).
41. 100 U.S. 195 (1879).
42. *Id.* at 202.
43. 320 P.2d 16 (Cal. 1958).
44. 364 P.2d 685 (Cal. 1961).

to the adversary by arguing that the duty runs only to the court. That is to ignore the fact that the court imposes the duty for the sake of individuals, including the adversary.

Then should parties be able to sue adversary lawyers who injure them by violating the ethics codes? Yes, indeed. Let us turn forthwith to the *Garcia* case, which concerns precisely this issue.

III.

Garcia has very rich facts. Garcia sued school board members in both their individual and official capacities for failing to renew his employment contract.[45] During the trial, the judge suggested that to avoid confusing the jurors, Garcia should drop his claims against the board members in their individual capacities.[46] In chambers the next day, Garcia's counsel agreed to do so.[47] The judge stated to defense counsel, "I mean if the plaintiff were recovering, then all at once the school district will not respond or claim some kind of immunity or something,"[48] and the defense counsel agreed that they would raise no immunity defenses.[49] Garcia won, and notwithstanding the conversation with the trial judge, the defendant raised an Eleventh Amendment immunity claim on appeal, and the court of appeals reversed the judgement.[50]

Garcia then sued defense counsel for malpractice, alleging that by saying they would not raise an immunity issue and then raising it nevertheless on appeal, defense counsel had breached a duty to Garcia.[51] Among other grounds, Garcia argued "that New Mexico's former Code of Professional Responsibility . . . give[s] rise to a private cause of action for damages against attorneys."[52] The opinion does not detail which provisions of the Code Garcia claimed that the defendants had breached; presumably he alleged a violation of DR 1-102(A)(4)[53] which states that "[a] lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."[54]

In any event, the court gave the argument short shrift. Like the court in *Carlson*, the court said that the Code was never intended as a malpractice standard. However, the most important argument is this, which is here quoted at length:

> An attorney has no duty however to protect the interests of a non-client adverse party for the obvious reasons that the adverse party is not the intended beneficiary of the

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45. *Garcia*, 750 P.2d at 120.

46. *Id.* These facts raise several interesting questions unrelated to our current topic. For example, did the trial judge fail in his own professional responsibility to protect Garcia's lawyers to agree to waive a defense that their own duty of zealous advocacy compels them to raise?

47. *Id.* at 120.

48. *Id.*

49. *Id.*

50. *Id.* at 120-21.

51. *Id.*

52. *Id.* at 123.

53. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (1981).

54. *Garcia*, 750 P.2d at 123.

> attorney's services . . . . An adverse party cannot justifiably rely on the opposing lawyer to protect him from harm; negligence contemplates a legal duty owing from one party to another and the violation of that duty by the person owing it. In the present context, this duty is owed by the lawyer to his client and to the legal system . . . . Historically, our court system has always been adversarial in nature. The role of the attorney therein is to represent and advocate a client's cause of action as vigorously as the rules of law and professional ethics will permit. For that reason an attorney's exclusive and paramount duty must be to the client alone and this duty cannot run to the client's adversary . . . . [T]he attorney's ongoing and justifiable concern with being sued for negligence would detrimentally interfere with the attorney-client relationship . . . . As a matter of public policy in order to maintain and enforce the fidelity and duty of the attorney toward the client, we cannot jeopardize the integrity of the adversarial system by imposing a professional duty on an attorney toward an adverse party.[55]

Here we find all the most important arguments for the long-standing doctrine that an attorney can never be negligent toward an adversary. There is the argument I have already criticized that a lawyers' duties run "to the legal system." In addition, the court denies the existence of a duty toward an adversary because a lawyer does not intend to benefit the adversary. To support this proposition, it appeals to the nature of the adversary system. Next it infers that because a lawyer does not intend to benefit the adversary, the adversary cannot rely on anything the lawyer says. Finally, the court suggests that to decide the matter otherwise would chill an attorney's zeal in the pursuit of his own client's interests.

All of these argument have some force. But when we add the fact that the deceitful conduct giving rise to this suit violated the Code, that force evaporates. Why? Let us consider the arguments in order. First, it is simply untrue that the "reasonable and prudent" lawyer does not intend to benefit his adversary. The reasonable and prudent lawyer intends to confine his zeal to the limits set by the ethics code, and that code contains a whole panoply of benefits to one's adversary – benefits, because they are standards of civility that make the adversary's life easier. Second, the adversary system does not underwrite limitless belligerence toward adversaries, but rather belligerence within carefully drawn rules of engagement, which include the ethics codes. Indeed, appealing to the adversary system gives additional force to the claim that a reasonable and prudent lawyer intends to confer the benefits of ethical behavior on the adversary – for the rules of engagement *are* the adversary system. It is true, of course, that some lawyers adopt a "winning-is-the-only-thing" version of advocacy (perhaps under the Shermanesque slogan "Law is hell"); but this has neither legal nor moral legitimacy.[56] Third, and as a direct consequence of the preceding points, a lawyer should be able to rely on the ethical behavior of an adversary lawyer in the same way that he relies on the adversary not to bribe the judge or shoot the witnesses. If the adversary lawyer is

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55. *Id.* at 122.

56. *See generally,* David Luban, *The Adversary System Excuse,* in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed. 1983).

reasonable and prudent, he will comply with the Code. Fourth, and last, while it is true that a general duty of care owed to adverse parties might chill a lawyer's partisan zeal, it is hard to see why the fact that the lawyer could be sued for violating the ethics code will chill anything other than violations of the ethics code. All advocacy up to the limits set by the rules is still possible.

What we see here is an interplay between two issues. If the ethics codes are taken as standards of civil liability, then the arguments against allowing adversaries as well as clients to recover for attorney negligence based on violations of the ethics codes evaporate. Conversely, once we see that the provisions in the ethics codes designed to protect the system as a whole are really intended in large measure to protect other litigants, then the chief objection to taking the ethics codes as standards of civil liability – that a lawyer's duty runs to the system and not to individuals – collapses.

There is, however, another objection to using ethics codes as standards of civil liability, and I shall close by addressing it. Code infractions run from the trivial to the major, and the disciplinary system is calibrated so that discipline can range from private reprimand to disbarment. The argument that a lawyer who is subject to discipline has fallen below the minimum standard of care seems fully plausible only when the disciplinary infraction is major. It might be thought to be terribly unfair, if a lawyer could be sued for significant amounts of money on an ethical infraction that warrants only a private reprimand from the disciplinary system.

The solution is to permit recovery only in cases where the judge first decides as a matter of law that the alleged misconduct would warrant serious discipline – suspensions or disbarment – if it is proven. With this modification, using the ethics codes to set civil liability standards seems like an idea whose time should soon come.